

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34335

KEOKUK JUNCTION RAILWAY COMPANY–FEEDER LINE ACQUISITION–
LINE OF TOLEDO PEORIA AND WESTERN RAILWAY CORPORATION BETWEEN
LA HARPE AND HOLLIS, IL

Decided: November 23, 2004

The requests to stay the effectiveness of the decision served in this proceeding on October 28, 2004 (October 28 decision), are being denied.

BACKGROUND

In the October 28 decision, the Board granted the feeder line application (Application) filed by Keokuk Junction Railway Company (KJRY) to purchase a line of railroad in western central Illinois (referred to as the La Harpe-Hollis Line or the Line). The Line is owned by Toledo, Peoria and Western Railway Corporation (TP&W) and extends 76 miles eastward from a connection to KJRY's line at La Harpe (milepost 194.5) to Hollis (milepost 118.5), where it connects with a line of the Union Pacific Railroad Company.

The Board found that KJRY's evidentiary showing supported a finding that the public convenience and necessity, 49 U.S.C. 10907(b)(1)(A)(i), permitted the proposed purchase of the La Harpe-Hollis Line and set the purchase price at the Line's net liquidation value (NLV), which the Board found to be \$3,940,756. Additionally, the Board: (1) stated that it would increase the purchase price of the Line if TP&W submits evidence on or before November 29, 2004, establishing a higher salvage value for the Line's reroll (rail that is one grade better than scrap and used for making fence posts or "rebar"); (2) gave KJRY until December 2, 2004 (or later if TP&W supplements the record on reroll), to notify the Board and TP&W whether it wishes to proceed with the purchase under the terms prescribed in the decision;¹ and (3) ordered KJRY to hold open until December 2, 2004 (or later

¹ KJRY submitted a letter accepting the prescribed terms on November 1, 2004.

if TP&W supplements the record on reroll), its offer to enter into the trackage rights agreement with TP&W contained in its June 9, 2003 Supplement. The decision is to become effective on November 27, 2004.

On November 5 and 8, 2004, respectively, TP&W and the United Transportation Union-Illinois Legislative Board (UTU-IL) filed petitions to stay the effectiveness of the Board's decision. KJRY filed a reply on November 12, 2004.

TP&W contends that the October 28 decision has caused it to suffer immediate and irreparable harm. Specifically, TP&W states that it has made a diligent effort to develop new business over the Canton-Hollis segment of the Line and that it expected to enter into a transportation contract with an unnamed prospective shipper located at or near Canton, milepost 138.5, sometime between November 1 and 12, 2004. Under the contract, TP&W would receive in interchange commodity shipments from an unnamed railroad at Sommer, IL, and move them to the shipper's facility at or near Canton. TP&W contends that the shipper is unwilling to proceed with the agreement at this time as a result of the October 28 decision, which requires TP&W to sell the Canton-Hollis segment to KJRY. The proposed shipments, TP&W claims, would yield operating revenues in excess of \$400,000 per year, which in turn would yield a going concern value (GCV) of \$4,255,319 for the Canton-Hollis segment (using the Board's current cost of capital figure).

TP&W also argues that this potential new traffic constitutes new evidence and changed circumstances and demonstrates that the Canton-Hollis segment was undervalued in the October 28 decision. The petitioner states that its request to reopen and reconsider the October 28 decision will seek to remove the Canton-Hollis segment from the Application or to establish a greater purchase price for the Line based on both the alleged \$4,255,319 GCV of the Canton-Hollis segment and the NLV of the La Harpe-Canton segment. TP&W further states that it would offer KJRY overhead trackage rights on the Canton-Hollis segment.

Additionally, TP&W argues that the decision contains material error. The petitioner claims that it was denied due process because KJRY, rather than submitting its own evidence on TP&W's title to the land in the Line's right-of-way, was instead permitted to establish the land value by challenging TP&W's evidence on rebuttal. Further, TP&W claims that it has sold, as fee simple, parcels along the right-of-way that the Board found it did not own in fee simple.

UTU-IL contends that the October 28 decision should be stayed because the Board failed to impose appropriate employee protective conditions.

KJRY disputes TP&W's contention that it was within days of entering into a contract for major commodity shipments. Asserting that TP&W does not have an agreement with the prospective

shipper, KJRY claims that the shipper is willing to work with KJRY if it purchases the Line. KJRY also notes that the shipper is not located on the Line, which, KJRY argues, makes rail service by either TP&W or KJRY subject to a number of unresolved contingencies.

DISCUSSION AND CONCLUSIONS

The standards governing disposition of a petition for stay are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). On a motion for stay, “it is the movant’s obligation to justify the . . . exercise of such an extraordinary remedy.” Cuomo v. United States Nuclear Regulatory Comm’n, 772 F.2d 972, 978 (D.C. Cir. 1985). The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

Likelihood of Prevailing on the Merits. Petitioners have not shown that they are likely to prevail on the merits. TP&W’s contention that it was about to enter into a transportation contract for major commodity shipments is unconvincing. TP&W does not even identify the shipper, its location, the nature of the traffic, or any of the circumstances of the negotiations that TP&W says took place. The purported shipper has not supported TP&W’s petition. The evidence TP&W has offered is simply not adequate to support a finding of new evidence or changed circumstances, either to modify the Board’s finding that the public convenience and necessity permit the sale of the Line or to alter the Line’s valuation.

TP&W’s contention that it was denied due process with respect to the valuation of the land underlying the right-of-way lacks merit as well. While KJRY’s valuation did not include a study based on TP&W’s fee interest in the right-of-way, TP&W could have petitioned for leave to supplement the record in response to KJRY’s reply submission, as it did with respect to the salvage value of the rail on the Line, but chose not to do so. Instead, TP&W has requested, and the Board has granted, an extension of the deadline to petition for reconsideration to permit TP&W to complete a review of the quality of TP&W’s title in the right-of-way. See decision served on November 16, 2004. This satisfies the due process requirements and a stay is not necessary to address issues arising from an analysis of what additional property, if any, TP&W held in fee simple.

UTU-IL’s contention that the Board failed to impose appropriate employee protective conditions is not supported. The Board extensively addressed labor protection in its October 28 decision. It complied with its statutory duty to require “to the maximum extent practicable, the use of

the employees who would normally have performed [the] work in connection with a railroad line subject to a sale under this section.” 49 U.S.C. 10907(e). In particular, it noted that few, if any, employees would be affected by the sale because TP&W has neither operated nor maintained most of the Line since December 2001. Nevertheless, the Board required “that KJRY, consistent with the statute and its own assurances, offer employment on a priority basis to qualified TP&W employees who previously worked on the Line.” Consistent with Board precedent, the Board did not require KJRY to continue rates of pay, rules, and working conditions that existed under TP&W.

UTU-IL acknowledges that employee protective conditions are not mandatory here. Although UTU-IL contends that the Board could have nevertheless provided some other arrangements (without clarifying their nature), it does not explain how the Board’s decision erred in not imposing them. UTU-IL’s arguments are not likely to prevail.

Irreparable Harm to Movants. TP&W’s arguments regarding an additional shipper and property ownership challenge the dollar value of the purchase price set by the Board. A dispute over compensation cannot establish irreparable injury absent a stay, because adequate compensation may subsequently be ordered. See, e.g., Sampson v. Murray, 415 U.S. 61, 90 (1974). Nor does the issue of employee protective conditions give rise to irreparable harm. TP&W employees have performed virtually no work on the Line for 4 years except for the 3-mile segment connecting to the Mapleton Industrial Spur and Wye Facility, and TP&W employees will continue to work on that segment because TP&W receives trackage rights over the segment.

Harm to Others. The imposition of a stay, on the other hand, would be harmful to the shippers who have used the Line in the past and support KJRY’s Application. A number of these shippers have not received service for years. Rail service over the 71.5-mile portion of the Line between La Harpe and Mapleton (La Harpe Line) declined dramatically after the right to operate over it along with its rail, ties, and certain other improvements were sold to SF&L Railway, Inc. (SF&L) in December 2000. See SF&L Railway, Inc.—Acquisition and Operation Exemption—Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL, STB Finance Docket No. 33995 (STB served Oct. 17, 2002) clarified (STB served Jan. 31, 2003). Service then ceased altogether when SF&L embargoed the La Harpe Line in October 2002, just after it petitioned for an exemption to abandon the La Harpe Line. See SF&L Railway, Inc.—Abandonment Exemption—in Hancock, McDonough, Fulton and Peoria Counties, IL, STB Docket No. AB-448 (Sub-No. 2X). Moreover, service did not resume after TP&W reacquired the La Harpe Line in February 2003, pursuant to the Board’s order. With the winter coming, a stay would only serve to further delay, complicate, and increase the cost of restoring rail service to the Line.

Public Interest. Petitioners have failed to show that the public interest supports the requested stay. To the contrary, the public interest supports the resumption of service, and the Board has found that TP&W should benefit financially from the sale.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petitions for stay are denied.
2. This decision is effective on its service date.

By the Board, Roger Nober, Chairman.

Vernon A. Williams
Secretary